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May 30, 2003

BY ELECTRONIC MAIL, FACSIMILE AND U.S. MAIL
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Susan L. Lebeaux
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington DC 20463

Re: FEC Notice 2003-9 (68 Fed. Reg. 23311): Notice of Hearing and
Request for Comment on Commission Enforcement Procedures

Dear Assistant General Counsel Lebeaux:

The following comments on the Federal Election Commission's Enforcement Procedures are submitted on behalf of the California Political Attorneys Association, a California non-profit mutual benefit corporation ("the CPAA").

The CPAA is a membership organization of California attorneys who practice political and election law, and who represent private clients in matters concerning federal, state and local campaign and election law matters. Many of the CPAA member attorneys represent clients that engage in activities in connection with federal elections, and some CPAA member attorneys represent persons that have been subject to enforcement proceedings conducted by the FEC. These comments do not represent the views of any single member of the CPAA, nor do they represent the views or opinions of the clients of CPAA members. Instead, they reflect the views of a task force of CPAA members who have participated in the development of the comments.

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First, the CPAA commends the Commission for seeking comments on its enforcement procedures and recommendations for improving those procedures, whether those improvements can be made by change of custom and practice or by regulatory or statutory amendment. The CPAA believes a periodic review of such procedures is important, and believes that public input is vital.

Second, the Commission requested comments on eleven specific subjects. The CPAA's comments address some but not all of these subjects.

Third, the CPAA believes the Commission should, as a general matter, provide more "process" to respondents in enforcement proceedings than at present. Such additional process should include the opportunity for respondent's counsel to present the respondent's position directly to the Commission, and not filtered through the General Counsel's office, which is largely the case now. The CPAA believes this should be the case in connection with "reason to believe" determinations and in consideration of counter-proposals for conciliation at the "pre-probable cause conciliation" stage, and not just at the probable cause stage, of enforcement proceedings.

Issue 1. Designating Respondents in a Complaint

The CPAA believes the Commission has sufficient latitude within its statutory and regulatory enforcement powers to designate respondents that the Commission believes may have committed a violation of the FECA. In general, the CPAA urges the Commission, as a matter of custom and practice, to ascertain that a sufficient nexus exists to a violation, alleged to have been committed by any person designated as a respondent, before making a "reason to believe" finding against such person. Persons who may be witnesses, but not violators, should not be charged as respondents at any stage of an enforcement proceeding. The "reason to believe" determination process should be used proactively by the Commissioners to cull out persons who the evidence does not support being charged as "respondents."

The CPAA believes the Commission should modify its practice of naming the "current" treasurer of a Committee as a respondent when there is no "reason to believe" that the current treasurer committed any violation. We strongly believe that the Commission has sufficient jurisdiction over the Committee involved, and can obtain jurisdiction over the former treasurer who was responsible for preparing reports of the Committee at the time of an alleged violation, to spare an "innocent" treasurer of being charged with, and potentially held accountable for, a violation for which he or she is not responsible. Administrative convenience of the Commission is no excuse for charging the "current" treasurer in such circumstances. The CPAA suggests that the record keeping requirements for a Committee could be modified to include contact information on former

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treasurers be maintained, for at least the length of time for which the statute of limitations on actions may apply to the former treasurer. Moreover, the CPAA recommends that to the extent the current treasurer would be required to file amendments to correct reports in connection with alleged, or admitted prior violations, the current treasurer could be named for purposes of compelling compliance, and dismissed if amendments were properly filed.

Issues 2 and 4. Confidentiality and Confidentiality Advisement; Deposition and Document Production Practices

The CPAA believes that confidentiality protections afforded by Section 437g(a)(12) protect the privacy interests of innocent parties at every stage of an FEC enforcement proceeding, from initiation of the investigation of a complaint through and beyond the completion of enforcement proceedings. See, e.g., *McConnell v. FEC*, 2003 WL 2010992, 251 F.Supp.2d 919 (D.D.C., 2003); *AFL-CIO and DNC v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001); and *In re Sealed Case*, 237 F.3d 657, 345 U.S.App.D.C. 19 (D.C. Cir. 2000). At the same time, due process requirements for persons accused of violating the FECA require that such persons be provided sufficient information from the Commission to conduct a defense. Thus, respondents should have the right to communicate with, and interview if necessary, witnesses who have provided testimony to the Commission, and should also have the right to obtain at an appropriate stage in their defense witness statements, deposition transcripts of Commission-administered depositions, and documents in the possession of the Commission, and on which the Commission intends to rely. Moreover, respondents should be entitled to interview Commission-identified witnesses and other respondents. As with the provision of documents, we believe the Commission could by regulation provide for limited waivers of confidentiality to permit such information to be obtained by respondents, limited to and for the express purpose of facilitating their own defense.

Issue 3. Motions before the Commission

The CPAA believes that the Commission should, consistent with allowing respondents more direct access to presenting their preliminary positions at the “reason to believe” stage and in the “pre-probable cause conciliation” process, allow for the filing of motions to dismiss and for motions to reconsider “reason to believe” and “probable cause” determinations.

The CPAA believes that the procedure currently provided for in Regulation 111.8 regarding demonstrations that the Commission should take no further action, could be applied to motions to dismiss or for reconsideration after “reason to believe” and after “probable cause.” Such motions should be allowed as to dismissal if the respondent presents genuinely new legal issues or facts not

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previously raised by the Commission or the respondents. We believe an appropriate limitation on such motions would be that a motion to dismiss or for reconsideration would not be allowable unless the respondent demonstrates that new legal issues or facts are presented that were not known to the respondents at the time the respondents either requested the Commission to take no further action under Regulation 111.8, or during probable cause briefing under Regulation 111.16.

Issue 5. Extensions of Time

The CPAA recommends the Commission adopt regulations or guidelines that would cover the subjects of the requesting and granting of extensions of time, similar to those found in court rules. For example, a request for extension of time to respond made in advance of the deadline should presumptively be granted for a certain period of time. Such a request should be granted for good cause shown. On the other hand, requests for extensions of time near the running of a statute of limitations should be granted only with a waiver of the statute for a commensurate period of time. In this way, every respondent would be able to know the procedures and would not be disadvantaged because the respondent did not have counsel as fully familiar with the rules as the most knowledgeable and experienced practitioners.

Issue 6. Appearances before the Commission

The CPAA believes that because virtually all cases are resolved by “pre-probable cause conciliation” or settlement after a probable cause determination and before civil litigation is initiated, the Commission should allow respondents to participate, either *pro se* or through counsel, at the probable cause stage and in connection with motions to quash subpoenas, in limited circumstances. The Commission should allow such participation if at least three Commissioners request that the respondent participate, in order to address specific issues on which the Commissioners believe argument would be appropriate because of the complexity of the factual or legal issues involved. While this comment does not include specific suggestions about the details of a procedure for permitting such participation, the CPAA does not believe that allowing such participation would substantially delay or complicate the Commission’s ability to conduct its business, and could lead to more realistic assessments and decisions about the prosecution of enforcement cases.

Issue 7. Releasing Documents or Filing Suit before an Election

The CPAA believes that the release of documents, or filing suit, should be maintained in the regular course of business, regardless of the fact that an election is at hand in which the respondent

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or respondents may be involved. This applies with particular force where a statute of limitations may be an issue. While the CPAA's members are also sensitive to the possibility that the taking or withholding of action may be done for partisan purposes, we believe that the Commission's bi-partisan balance provides a useful check on the potential for abuse.

Issue 10. Prioritization

The Commission's notice asked for comments on the issue of publicizing the Commission's policies for prioritizing enforcement resources. We understand that in the past, the General Counsel's office has vigorously defended the confidentiality of the enforcement priority guidelines, even to the extent of urging the Commission to refuse to give them to Congress, and the Commission has strictly followed that advice. While some may believe there are good reasons to keep the enforcement priority guidelines confidential, arguing that it would lessen the possibility of sophisticated practitioners advising clients on how to game the system or disregard requirements that were low on the enforcement priorities, the CPAA has observed that enforcement agencies have views about the relative importance of the statutes violated and act on those views about enforcement priorities – by prioritizing enforcement case management and providing for different means of enforcement where possible. For example, the Commission has created a separate, expedited procedure for handling campaign report non-filing and late-filing violations, and has established a fine schedule for such violations, as one means of publicizing its priorities. This is not a boon to the sophisticated campaigns, filers and other actors. Rather, the CPAA believes disclosure of enforcement priorities also serves deterrence and public informational (compliance) purposes, by better informing both sophisticated and unsophisticated of the Commission's intentions with respect to enforcement of those statutes it believes are the most significant.

Issue 12. Dealing with “3-3 Votes” at Reason to Believe Stage

The CPAA believes that the “reason to believe” stage is one at which the Commission has the opportunity to weed out less serious enforcement cases and to avoid making law by enforcement in cases as to which there is a significant difference of opinion among the Commissioners as to whether the law supports the proposed enforcement action. The four-vote majority is an important baseline standard for the accomplishment of these purposes. To permit the General Counsel to proceed on “3-3 votes” where a deadlock arises at the earliest stage in the proceeding would invest the General Counsel's office with greater power than it has already, and could in our view upset the delicate balance of powers of this agency, as established by Congress. Therefore, we do not believe such a proposal should be explored further.

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Thank you for the opportunity to comment on the Commission's enforcement procedures. We will not participate in the Commission's June 11, 2003 hearing, but look forward to opportunities to participate in any rulemaking proceedings that may follow from that hearing and the Commission's consideration of written comments and oral testimony.

Very truly yours,

James A. Sivesind, President

Charles H. Bell, Jr.

CHB:sa